Yew Yin Lai v Teo Meng Hai & Anor

HIGH COURT (MELAKA) — DIVORCE PETITION NO MT1–33–135 OF 2003
LOW HOP BING J
16 MAY 2007

Civil Procedure — Interrogatories — Application for leave to serve — Application after close of pleadings — Whether necessary to give explanation for delay — Whether merit of application relevant — Whether interrogatories could be issued — Divorce and Matrimonial Proceedings Rules 1980 rr 3, 25 — Rules of the High Court 1980 O 18 r 20(1)(b), O 26 r 1(1)

The wife filed a petition for divorce and served it on her husband and the co-respondent. The respondent husband promptly filed and served answers to the petition and a counter-application on the petitioner wife. A few days later, the co-respondent too filed and served her answers to the petition. The petitioner filed no reply or defence to the husband's cross-application. No other pleadings were filed. Some six months later the wife sought leave to serve interrogatories on the husband and co-respondent. The husband and the co-respondent questioned the delay in filing the interrogatories. Counsel for the wife argued that an application for leave to serve interrogatories by the wife in a divorce petition need not be made before the close of pleadings.

Held, upholding the objections and denying leave to serve interrogatories:

(1) The procedure regulating applications for leave to serve interrogatories is found in the Divorce and Matrimonial Proceedings Rules 1980 ('DMPR'). Rule 3(1) provides that the Rules of the High Court 1980 ('RHC') shall apply, with the necessary modifications, to the matrimonial proceedings in the High Court. Thus the practice and procedure for applications for leave to serve interrogatories is regulated by both the DMPR and the RHC (see paras 7–8).

(2) Rule 25 of the DMPR makes O 26 r 1 applicable to a defended cause begun by petition as it applies to a cause therein. However O 26 r 1 of the RHC should be read and construed conjunctively with O 26 r 2 of the RHC under which a party to any cause or matter may at any time before the close of pleadings without leave of the court deliver interrogatories relating to any matter in question between the parties (see paras 9–10).

(3) Pleadings are deemed closed, as provided for in O 18 r 20(1) of the RHC, 14 days after service of a defence or a reply or a defence to counterclaim, as appropriate. Where, as here, pleadings are deemed closed, O 26 r 1(1) of the

RHC applies and leave is a sine qua non. To obtain leave, there must be an explanation for the filing of the application after the close of pleadings. If reasons for the delay were not forthcoming, then it was irrelevant to consider the merits. The absence of any explanation for the delay was fatal to the application (see paras 16–17, 19); *Shum Kai Cheong v See Too Woon Yee* [1998] 4 MLJ 155 and *Sarawak Building Supplies Sdn Bhd v The Director of Forest, Forest Department Headquarters, Kuching & Ors* [1999] 8 CLJ 527 followed.

(4) The petitioner's intention was and had always been to prove adultery. The divorce petition set out the correct approach ie to prove the allegations at the hearing. The petitioner bore the burden of proof and the standard of proof for adultery was beyond reasonable doubt, and not merely on a balance of probabilities. A fortiori, it should not be proved by way of affidavit only. It needed to be established by oral testimony and to be tested by cross-examination and re-examination at trial (see para 21); *Koh Teng Lam v Elsie Koh Chen Chee & Anor* [1976] 1 MLJ 103, *Kang Ha Heng v Ng Moot Tee* [2001] 3 MLJ 331 and *Karen Cheong Yuen Yee v Phua Cheng Chuen* [2004] 7 CLJ 102 referred.

[Bahasa Malaysia summary

Si isteri telah memfailkan satu petisyen untuk perceraian dan telah menyampaikannya ke atas suaminya dan responden bersama. Responden suami dengan segera telah memfailkan dan menyampaikan jawapan-jawapan kepada petisyen itu dan satu permohonan balas ke atas pempetisyen isteri. Beberapa hari kemudian, responden bersama juga telah memfailkan dan menyampaikan jawapannya berhubung petisyen itu. Pempetisyen tidak memfailkan apa-apa jawapan atau pembelaan terhadap permohonan balas suami. Tiada pliding lain telah difailkan. Selepas enam bulan si isteri telah memohon kebenaran untuk menyampaikan pertanyaan-pertanyaan ke atas suami dan responden bersama. Suami dan responden bersama menyoal kelewatan dalam pemfailan pertanyaan-pertanyaan tersebut. Peguam bagi pihak isteri berhujah bahawa satu permohonan untuk kebenaran menyampaikan pertanyaan-pertanyaan oleh isteri dalam satu petisyen perceraian tidak perlu dibuat.

Diputuskan, menegekalkan bantahan dan menafikan kebenaran untuk menyampaikan pertanyaan-pertanyaan:

(1) Prosedur mengawal permohonan untuk kebenaran menyampaikan pertanyaan-pertanyaan didapati dalam Kaedah-Kaedah Prosiding Perceraian dan Perkahwinan 1980 ('DMPR'). Kaedah 3(1) memperuntukkan bahawa Kaedah-Keadah Mahkamah Tinggi 1980 ('KMT') hendaklah terpakai, dengan pengubahsuaian yang perlu, untuk prosiding perkahwinan di Mahkamah Tinggi. Oleh itu amalan dan prosedur untuk permohonan kebenaran menyampaikan pertanyaan-pertanyaan adalah dikawal oleh kedua-dua DMPR dan KMT (lihat perenggan 7–8).

(2) Kaedah 25 DMPR menjadikan A 26 k 1 boleh digunakan untuk kausa yang dibela yang dimulakan oleh petisyen kerana ia berkaitan dengan kausa di sini. Namun A 26 k 1 KMT hendaklah dibaca dan ditafsir sebagai penghubung dengan A 26 k 2 KMT di mana satu pihak kepada apa-apa kausa atau perkara boleh pada bila-bila masa sebelum penutup pliding tanpa kebenaran mahkamah menyampaikan pertanyaan-pertanyaan berkaitan apa-apa perkara yang dipersoalkan antara pihak-pihak (lihat perenggan 9–10).

(3) Pliding-pliding dianggap ditutup, seperti yang diperuntukkan dalam A 18 k 20(1) KMT, 14 hari selepas penyampaian pembelaan atau jawapan atau pembelaan kepada tuntutan balas, mengikut kesesuaian. Di mana, seperti di sini, pliding-pliding dianggap telah ditutup, A 26 k 1(1) KMT adalah terpakai dan kebenaran adalah sine qua non. Untuk mendapat kebenaran, perlulah ada satu penjelasan untuk pemfailan permohonan selepas pliding ditutup. Jika tiada alasan-alasan untuk kelewatan itu, maka ia adalah tidak relevan untuk menimbangkan merit. Ketiadaan apa-apa penjelasan kerana kelewatan itu memudaratkan permohonan tersebut (lihat perenggan 16–17, 19).

(4) Niat pempetisyen adalah dan sentiasa untuk membuktikan perlakuan berzina. Petisyen perceraian telah menetapkan pendekatan yang betul, iaitu untuk membuktikan pengataan-pengataan semasa perbicaraan. Pempetisyen mempunyai beban bukti dan piawai bukti untuk perlakuan berzina melampaui keraguan munasabah, dan bukan semata-mata berdasarkan imbangan kebarangkalian. A fortiori, ia tidak patut dibuktikan hanya melalui afidavit. Ia perlu dibuktikan melalui pengakuan berlisan dan diuji melalui pemeriksaan balas dan pemeriksaan semuala semasa perbicaraan (lihat perenggan 21); *Koh Teng Lam v Elsie Koh Chen Chee & Anor* [1976] 1 MLJ 103, *Kang Ha Heng v Ng Moot Tee* [2001] 3 MLJ 331 dan *Karen Cheong Yuen Yee v Phua Cheng Chuen* [2004] 7 CLJ 102 dirujuk.]

Notes

For cases on application for leave to serve, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 3308–3312.

Cases referred to

Bastable v Bastable [1968] 1 WLR 1684 (refd)
Kang Ha Heng v Ng Moot Tee [2001] 3 MLJ 331 (refd)
Karen Cheong Yuen Yee v Phua Cheng Chuen [2004] 7 CLJ 102 (refd)
Koh Teng Lam v Elsie Koh Chen Chee & Anor [1976] 1 MLJ 103 (refd)
Shum Kai Cheong v See Too Woon Yee [1998] 4 MLJ 155 (folld)
Sarawak Building Supplies Sdn Bhd v The Director of Forest, Forest Department Headquarters, Kuching & Ors [1999] 8 CLJ 527 (folld)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 r 3(1)
Rules of the High Court 1980 O 18 r 20, O 26 r 1(1)

Moi Teik Seng (Moi Teik Seng & Partners) for the co-respondent.
WK Chew (HS Chew & Co) for the husband.
Mogan Karupiah (Mogan Karupah) for the wife.

Low Hop Bing J:

APPLICATION

[1] Vide summons in chambers in encl (22), the petitioner-wife ('the wife') is seeking leave under O 26 r 1(1) of the Rules of the High Court 1980 ('O 26 r 1(1)') to serve on the respondent-husband ('the husband') and another woman, the co-respondent, interrogatories in the First Schedule and the Second Schedule thereto respectively:

(i) relating to the issues, primarily of adultery and consequentially of paternity, which were called into question in the divorce petition presented by the wife; and

(ii) requiring the husband and the co-respondent to answer the interrogatories on affidavit within 14 days of the order.

CHRONOLOGY OF PLEADINGS

[2] As encl (22) was made pursuant to O 26 r 1(1), it is essential for me to place in proper perspective the chronology of pleadings prior to its filing, as follows:

Date	Event
10 September 2003	The wife presented and served on the husband and the co-respondent the divorce petition
17 October 2003	The husband filed and served on the wife the answers and counter application
20 October 2003	The co-respondent filed and served her answers
20 October 2003 to 14 June 2004	The wife did not file any other pleading
15 June 2004	The wife filed end (22) for leave to serve interrogatories

PROCEDURE FOR INTERROGATORIES

[3] The husband's learned counsel Mr WK Chew submitted that the wife who filed encl (22) after the close of pleadings has failed to give any explanation therefor. He prayed that encl (22) be dismissed with costs. Support was sought in:

(i) r 3(1) of the Divorce and Matrimonial Proceedings Rules 1980 ('r 3(1)');

(ii) O 18 r 20 and O 26 r 1(1) of the Rules of the High Court 1980;

(iii) *Shum Kai Cheong v See Too Woon Yee* [1998] 4 MLJ 155 (HC); and

(iv) *Sarawak Building Supplies Sdn Bhd v The Director of Forest, Forest Department Headquarters, Kuching & Ors* [1999] 8 CLJ 527 (HC).

[4] Co-respondent's learned counsel Mr Moi Teik Seng also asked for encl (22) to be dismissed with costs as discretion should not be exercised in favour of the wife.

[5] The wife's learned counsel Mr Mogan Karupiah argued that the above procedural issue raised for both the husband and the co-respondent was misconceived, and devoid of merits, as the wife is entitled to invoke O 26. He added that O 26 does not provide that the application for leave to serve interrogatories must be made before the close of pleadings.

[6] Having regard to the above diverse submissions, it is necessary for me to examine the proper procedural steps which ought to be taken by the wife in relation to encl (22).

[7] The procedure regulating the filing of encl (22) is to be found in the Divorce and Matrimonial Proceedings Rules 1980. Rule 3(1) where relevant reads:

> Subject to these Rules and to any other written law,... the Rules of the High Court 1980 shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending... in the High Court...

[8] In my view, r 3(1) authorises the application of eg the Rules of the High Court 1980 with necessary modifications. For this purpose, in a case or proceedings pending in the High Court, any provision of the Divorce and Matrimonial Proceedings Rules 1980 authorising or requiring anything to be done in matrimonial proceedings shall be treated as if it were a provision of the Rules of the High Court 1980: r 3(2).

In dealing with encl (22), it is abundantly clear that the practice and procedure shall be regulated by both the Rules of the High Court 1980 and the Divorce and Matrimonial Proceedings Rules 1980. In this regard, these two sets of Rules are collectively considered as part and parcel of the Rules of the High Court 1980.

[9] That brings me to the construction of Rule 25 of the Divorce and Matrimonial Proceedings Rules 1980 which specifically provides as follows:

> RHC O 26 r 1 shall apply to a defended cause begun by petition as it applies to a cause within the meaning of that Order.

[10] Order 26 r 1 should be read and construed conjunctively with O 26 r 2, under which a party to any cause or matter may at any time before the close of pleadings without leave of the court deliver interrogatories relating to any matter in question between the parties. **A**

[11] Order 26 r 2 which provides for the serving of interrogatories without any leave could only be invoked by the wife before the close of pleadings: see MLJ *Malaysian Court Forms in Civil Procedure*, 2002 para 14002, cited for the wife; *Sham Kai Cheong* at p 255g and *Sarawak Building Supplies Sdn Bhd*. **B**

[12] The meaning of the expression 'the close of pleadings' is to be found in O 18 r 20(1). It is expressly provided therein that the pleadings in an action are deemed to be closed: **C**

(a) at the expiration of 14 days after service of the reply or, if there is no reply but only a defence to counterclaim, after the service of the defence to counterclaim; or

D

(b) if neither a reply nor a defence to counterclaim is served, at the expiration of 14 days after service of the defence.

[13] In the above chronology of pleadings, the wife has not filed a reply or a defence to the husband's counterclaim (the cross-application herein). That being the case, O 26 r 1 and O 18 r 20(1)(b) would apply, and the pleadings are deemed to be closed 14 days after service of the defence (the answers herein). **E**

[14] As the husband's defence (the answers herein) and the co-respondent's defence (the answers herein) were served on 17 October and 20 October 2003 respectively, the pleadings were deemed to be closed 14 days thereafter viz 31 October 2003 and 4 November 2003 respectively. **F**

[15] However, the wife had only filed encl (22) on 15 June 2004, which is beyond the 14 days time frame and is indeed some six months after the pleadings were deemed to be closed. **G**

[16] Where the pleadings are deemed to be closed as in the instant case, O 26 r 1(1) would apply and leave is a sine qua non. In order to obtain leave, there must be an explanation for filing the application after the close of pleadings.

H

[17] Order 26 r 1(1) was considered in *Shum Kai Cheong* where after the close of pleadings the applicant sought leave to serve interrogatories upon the respondent. The applicant did not give any reason for the delay in the application which was consequently dismissed by the learned registrar. On appeal, it was submitted for the applicant that the time of the filing of the application was not a material factor when considering whether to grant or refuse leave. The respondent stressed that the issue was not the late filing but the fact that it was done after the close of the pleadings without any explanation. Abdul Kadir Sulaiman J (later FCJ) dismissed the appeal and enunciated the following principles: **I**

(i) where an application for leave to serve interrogatories is made after the close of pleadings, the applicant must satisfactorily explain to the court as to why it was not done within O 26 r 2 and so a satisfactory explanation for delay is a prerequisite;

(ii) where an applicant gave no reason at all for the delay except to explain the need for interrogatories, on the ground of the lack of explanation for the delay alone, the registrar was right in dismissing the application; and

(iii) merits of the application will only be considered after the explanation for delay has been considered, but if the reason for the delay is not forthcoming, then it is irrelevant to consider merits.

Sarawak Building Supplies Sdn Bhd concerns another application for leave to serve interrogatories. It was also made after the close of pleadings. No explanation was given for the delay in making that application. Mohamed Kamil Awang J followed *Shum Kai Cheong* and dismissed the application.

[18] Reverting to encl (22) herein, it is significant to note that the wife's affidavit gave no explanation for filing the application after the close of pleadings. Her learned counsel had not submitted why the above two High Court judgments should not be followed by me. With the utmost respect, I agree with the principles set out in the above two High Court judgments. Since encl (22) was made under O 26 r 1(1) ie after the closing of pleadings, the absence of any explanation for the delay is fatal to encl (22).

DIVORCE PETITION

[19] Paragraph 10 of the wife's divorce petition alleged that the husband had committed adultery with the co-respondent and para 11 therein avers that 'the Petitioner will prove the said adultery of the respondent with the co-respondent, by oral and documentary evidence, at the hearing of the Petition herein'.

[20] In the light of the allegations contained in paras 10 and 11 of the wife's divorce petition, it is clear that the wife's intention is and has always been to prove adultery at the hearing of the petition. It appears to me that para 11 of the wife's divorce petition has set out the correct approach ie to prove the said allegations at the hearing, since the petitioner bears the burden of proof and the standard of proof for adultery is that beyond reasonable doubt and not merely on a balance of probabilities: see eg *Bastable v Bastable* [1968] 1 WLR 1684, p 1687 per Wilmer LJ;*Koh Teng Lam v Elsie Koh Chen Chee & Anor* [1976] 1 MLJ 103 per Choor Singh J (Singapore High Court); *Kang Ha Heng v Ng Moot Tee* [2001] 3 MLJ 331, p 337 (HC) per VT Singham J; *Karen Cheong Yuen Yee v Phua Cheng Chuen* [2004] 7 CLJ 102 per Faiza Tamby Chik J (as he then was). A fortiori, it should not be proved by way of affidavit only. It is to be established in the form of oral testimony, the veracity of which is to be tested by way of cross-examination and re-examination at the trial itself.

CONCLUSION

[21] On the foregoing grounds, I hold that the wife's application in encl (22) is fundamentally flawed. I am therefore unable to exercise my discretion in favour of the wife under O 26 r 1(1). In the circumstances, I dismiss encl (22) with costs.

Application dismissed.

Reported by Sivapragasam Kumaran